# In the Supreme Court of the United States

OCTOBER TERM, 1971

---

No. 71-809

MORTON MAYER SOBEL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 443 F. 2d 1370.

### JURISDICTION

The judgment of the court of appeals was entered on July 15, 1971. A petition for rehearing was denied on

October 22, 1971. Mr. Justice Douglas extended the time within which to file a petition for a writ of certiorari to December 21, 1971; the petition was filed on December 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the court of appeals was obliged to enter a judgment of acquittal in this case following its reversal of petitioner's conviction on the ground that the government had failed to sustain its burden of proof on the issue of sanity.

## STATUTE INVOLVED

28 U.S.C. 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

## STATEMENT

Petitioner was tried before a jury in the United States District Court for the Central District of California on a six-count indictment charging various sales of narcotics, in violation of 26 U.S.C. (1964 ed.) 4705 (a) and 21 U.S.C. (1964 ed.) 174. A mistrial was de-

clared after the jury had acquitted on two counts but had been unable to agree on a verdict as to the remaining four counts. By agreement of the parties, the cause was then submitted to the court for decision on the basis of the trial record. The court found petitioner guilty on the four remaining counts, and imposed a sentence of five years as to each, the terms to run concurrently (Pet. 5-7). The court of appeals reversed, stating (Pet. App. A): "We find the government, once sanity was in issue, did not sustain its burden of proof." Petitioner requested a rehearing, with the suggestion that the case be reheard *en banc*, asking the court to modify its opinion so as to preclude the possibility of a retrial (Pet. App. B). Rehearing was denied, and the district court thereafter set the case down for retrial. By order of Mr. Justice Douglas, extending the time for filing a petition for certiorari, the proceedings in the district court were stayed (Pet. 10).

The record shows that, after petitioner's lay witnesses had testified on the issue of sanity, the court granted the government's motion to require that petitioner submit the following morning to examination by a psychiatrist (Pet. 12-13). The defense that same day then called as its witness a psychiatrist who testified that, in his opinion, petitioner, as a result of mental disease, lacked substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law (Pet. 15-16). The defense then rested. The government indicated that it might withdraw its request for further psychiatric examination of petitioner, since such an ex-

amination would entail a delay of about a day. At this suggestion petitioner moved for a judgment of acquittal and the motion was denied. The court then granted the government's motion to withdraw its request for appointment of a psychiatrist (Pet. 16-20). The case was argued and submitted to the jury, and later to the court, as set forth above.

## ARGUMENT

Petitioner contends here, as he did in his petition for rehearing below (Pet. App. B), that, upon reversal of conviction, he was entitled to a court of appeals' order preventing him from being retried. Under 28 U.S.C. 2106, an appellate court has discretion to direct the entry of an appropriate judgment or to require such further proceedings "as may be just under the circumstances." Petitioner does not attack the validity of the statute or its general applicability to appeals from criminal conviction. We submit that the statute is valid, is applicable to the problem presented here, and that the court of appeals wisely exercised its discretion in the circumstances of this case.

1. In *Bryan* v. *United States*, 338 U.S. 552, this Court traced the history of 28 U.S.C. 2106; it noted that under predecessor enactments new trials had often been directed as a matter of course upon reversal of a conviction for insufficiency of the evidence. While placing some weight on the fact that in that case (unlike here) the defendant had moved for a new trial in the district court, the Court in *Bryan* held that 28 U.S.C. 2106 had not abrogated the former practice of ordering

a new trial where just under the circumstances. A new trial, it concluded, rather than an acquittal did not violate the Double Jeopardy clause.

Petitioner argues that *Bryan* should be limited to the situation where a defendant actually requests a new trial in the trial court (in addition to seeking acquittal) so that he may be deemed to have opened "the whole record for such disposition as might be just." *Sapir* v. *United States*, 348 U.S. 373, 374 (Douglas, J., concurring). But this Court, in *Forman* v. *United States*, 361 U.S. 416, rejected any such limitation on the court of appeals' authority to order a new trial following a reversal. Thus, the Court, while indicating that an explicit request below for a new trial was a factor to be considered, held that 28 U.S.C. 2106 authorizes the granting of a new trial by appellate courts when they deem it just to do so, irrespective of the relief requested in the trial court; nor, the court added, does such action offend the Double Jeopardy Clause (361 U.S. at 425):

> Petitioner says that he does not come xxx [within] that rule [*i.e. United States* v. *Ball*, 163 U.S. 662] because he moved for a judgment of acquittal on the basis of a lack of evidence, and that his right to acquittal "matured" at that time. A new trial, however, was one of petitioner's remedies. As we said in *Bryan* v. *United States*, 338 U.S. 552, 560 (1950), where one seeks reversal of his conviction, "assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal xxx 'there is no double jeopardy upon a new trial.'" Even though petitioner be right in

his claim that he did not request a new trial with respect to the portion of the charge dealing with the statute of limitations, still his plea of double jeopardy must fail. Under 28 U.S.C. § 2106, the Court of Appeals has full power to go beyond the particular relief sought. See *Ball* and other cases, *supra*. Nor does *Sapir* v. *United States*, 348 U.S. 373 (1955), require a different conclusion, as petitioner claims.* * *[1]

Accord: *Amador Beltran* v. *United States*, 302 F. 2d 48, 52 (C.A. 1); *Rucker* v. *United States*, 288 F. 2d 146, 147 (C.A. D.C.); *United States* v. *Nall*, 437 F. 2d 1177, 1187 (C.A. 5); *Staggers* v. *Stynchcombe*, 436 F. 2d 585 (C.A. 5); *contra*, *United States* v. *Musquiz*, 445 F. 2d 963-966 (C.A. 6).

2. Petitioner urges that in any event a new trial would not be fair under the circumstances presented here since the government deliberately bypassed the opportunity to offer evidence on the issue of sanity. But the government's decision not to delay the trial so that petitioner could be given a further psychiatric

---

[1] Mr. Justice Harlan, concurring, echoed this view, stating (361 U.S. at 428): "He [petitioner] is subject to retrial solely because he appealed his conviction and because, in the circumstances disclosed by this record, such relief was just and appropriate under 28 U.S.C. § 2106. The *Ball*, *Green*, and *Bryan* cases * * * establish that the right of an appellate court to order a new trial does not turn on the relief requested by the defendant, and the *Sapir* case does not suggest such a distinction." Nor does *Buatte* v. *United States*, 330 F. 2d 342 (C.A. 9), relied on by petitioner. There the court recognized that it had the power under 28 U.S.C. 2106 to order a new trial but deemed the circumstances such that a new trial would serve no useful purpose. *Id.* at 347.

examination was based on its belief that it had demonstrated that the testimony of the defense psychiatrist was "based on an incorrect view of the facts" which it expected to "be rejected by the trier of facts" (Pet. App. C 3). Although the court of appeals concluded that this good faith assessment was mistaken, the mistake was not such as to render a retrial inappropriate. Several lower courts have indicated that the likelihood that additional evidence will be forthcoming at a future trial is a factor militating in favor of awarding a retrial rather than an acquittal under 28 U.S.C. 2106. See *United States* v. *Nall, supra; Amador Beltran* v. *United States, supra;* compare *Buatte* v. *United States, supra; United States* v. *Goodson,* 439 F. 2d 1056, 1059 (C.A. 5).

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

HENRY E. PETERSEN,
*Assistant Attorney General.*

ROGER A. PAULEY,
KIRBY W. PATTERSON,
*Attorneys.*

FEBRUARY 1972.

☆U.S. Government Printing Office: 1972—455-935/455